INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	3
Argument	7
Conclusion	11

CITATIONS

Cases:

Levinson v. *Spector Motor Service*, 330 U. S. 649 ..... 8, 9, 10

No. MC-2, Ex Parte, 28 M. C. C. 125 ..... 9, 10

Pyramid Motor Freight Corp. v. *Ispass*, 330 U. S. 695 ..... 7, 8, 10

United States v. *American Trucking Associations*, 310 U. S. 534 ..... 8, 9, 10

Statutes:

Fair Labor Standards Act (52 Stat. 1060, 29 U. S. C. 201, *et seq.*)

Section 7 3

Section 11(c) 3

Section 13(b)(1) 2, 3, 7

Motor Carrier Act of 1935 (August 9, 1935, c. 498, 49 Stat. 543, 49 U. S. C. 301, *et seq.*)

Section 204 ..... 2, 3

760388—47

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 210

GORDONS TRANSPORTS, INC., PETITIONER

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The district court wrote no opinion. Its findings of fact and conclusions of law appear at pages 292 to 311 of the record. The judgment of the circuit court of appeals (R. 323) is reported at 162 F. 2d 203.

JURISDICTION

The judgment of the circuit court of appeals was filed on April 14, 1947 (R. 323). The petition for a writ of certiorari was filed on July 14, 1947. The jurisdiction of this Court is invoked

under Section 240 (a) of the Judicial Code, as amended.

QUESTION PRESENTED

Whether employees classified as "hostlers," "breakout men" and "wheelers", engage in the character of activities which the Interstate Commerce Commission has determined affects the safety of operation of motor vehicles in interstate transportation so that they are subject to regulation by the Commission under Section 204 of the Motor Carrier Act, and therefore exempt from the overtime requirement of the Fair Labor Standards Act under Section 13 (b) (1) of the latter Act.

STATUTES INVOLVED

Section 13 (b) (1) of the Fair Labor Standards Act (52 Stat. 1060, 29 U. S. C. 213 (b) (1)) provides:

> The provisions of section 7 shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935.

Section 204 (a) of the Motor Carrier Act (August 9, 1935, c. 498, 49 Stat. 543, 49 U. S. C. 304 (a)) provides:

> It shall be the duty of the Commission—
> (1) To regulate common carriers by motor vehicle as provided in this part, and to

that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

(2) To regulate contract carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

(3) To establish for private carriers of property by motor vehicle, if need therefor is found, reasonable requirements to promote safety of operation, and to that end prescribe qualifications and maximum hours of service of employees, and standards of equipment. * * *

STATEMENT

This action was instituted by the Administrator of the Wage and Hour Division, United States Department of Labor, to enjoin petitioner from violating the overtime (Section 7) and record keeping (Section 11 (c)) provisions of the Fair Labor Standards Act (R. 3). Petitioner's answer claims the exemption provided by Section 13 (b) (1) of the Fair Labor Standards Act for employees subject to Section 204 of the Motor

Carrier Act of 1935 (R. 8–9). Petitioner, a Tennessee corporation, operates as a property motor carrier in several States (R. 292, 293). Its central offices, warehouse and garages are located in Memphis, Tennessee (R. 293). The suit originally related to "checkers," "stackers," "breakout men," "wheelers" (or "dock hands"), and "hostlers" employed in petitioner's Memphis operations (R. 293, 294, 295, 303). Only the "breakout men," "wheelers" and "hostlers" are involved in the present proceeding (R. 323).

Interstate freight is received at, and shipped from petitioner's Memphis warehouse. The duties of the "breakout men" and "wheelers" relate to the unloading of freight and to activities which precede the actual loading. The duties of "hostlers" relate to the movement of tractors and trailers around petitioner's premises to facilitate loading and unloading. When the over-the-road tractors and trailers, which are parked by their drivers on a lot adjacent to the warehouse and loading dock, are ready to be loaded or unloaded, they are "spotted" by "hostlers" who move them to the proper place on the dock. After being loaded, they are placed on the parking lot by the "hostlers" where they are received by the over-the-road drivers. The loading and unloading of the trucks, as well as the movement of freight about petitioner's warehouse and docks, are performed by crews of warehouse employees consisting of a "checker," a "breakout man," a

"stacker" and from two to four "wheelers." (R. 294–295.) When a truck is unloaded, the "breakout man" removes the freight from the truck, calls it off to the "checker" and places it upon a hand truck called a "two-wheeler". The "checker" checks the freight against the manifest and instructs the "wheeler" (or "dock hand") where to place it. The "wheeler" rolls the freight to the designated place where it is removed from the two-wheeler by the "stacker" who places it in the bin, on the warehouse floor, or in the truck which is being loaded. (R. 296.) When a truck is loaded, the "checker", who exercises general supervision over the loading activities of the crew, stands by the freight in the warehouse and checks it against the manifest as to quantity, consignee, and destination. The "breakout man" removes the freight from its location, calls it off to the "checker," and places it on the two-wheeler. The "stacker" removes it from the two-wheeler and stacks it in the truck. When this process is completed, the "checker" notifies the warehouse foreman that the truck is loaded and ready for inspection and sealing. (R. 296, 297, 298.)

The activities of the "breakout men" consist almost entirely of removing freight from trucks that are being unloaded or from bins in the warehouse. They have no connection with the loading of freight except on infrequent occasions, involving not more than 15 to 30 minutes a day, when

the whole crew assists in loading a heavy piece of freight. (R. 300–301.) Similarly, the principal activities of the "wheelers" consist of pushing the freight across the docks and through the warehouse after it has been placed on the two-wheelers by the breakout men. Sometimes they may hand a package to the "stacker" or if freight is too heavy for one man to lift, they help him load it. The "stackers" are responsible, under the supervision of the "checkers," for the proper loading of the freight to insure safe operation of the truck upon the highway. (R. 301, 302.)

The primary duty of the "hostlers" is spotting the tractors and trailers on the parking lot and dock for loading and unloading (R. 303). The incidental driving which they do is confined entirely to petitioner's premises except for a "negligible" amount of time when they operate for a few feet on the two city streets which bound the premises (R. 293, 305). The "hostlers" also engage in the coupling of tractors to trailers so that they may be moved about petitioner's premises and this is sometimes done prior to their movement over the road (R. 304, 305–306). Coupling operations are virtually automatic and consume from thirty minutes to one hour and a half in a nine-hour day (R. 303–304).

The district court held that the duties of the "checkers" who supervise the loading, and of the "stackers" who are responsible for properly placing the freight in the truck, directly affect the

safety of operation of motor vehicles in interstate transportation and bring them within the 13 (b) (1) exemption (R. 308). The principle duties of the "breakout men", "wheelers", and "hostlers", however, were found not to affect safety of operation and Section 13 (b) (1) was held inapplicable (R. 301, 305, 306, 308, 309, 310). The district court's holding with respect to the "checkers" and "stackers" was not appealed. With respect to the "breakout men", "wheelers", and "hostlers", the court below held "that the determination of the District Court is in accordance with the rule laid down in *Pyramid Motor Freight Corp.* v. *Ispass et al.*, [330 U. S. 695, 708] * * * and that the findings of the District Court are clearly supported by the record" (R. 323).

ARGUMENT

After making precise findings with respect to each step of petitioner's loading and unloading operations, in which it set forth in meticulous detail the specific duties of the "wheelers", "breakout men", and "hostlers", the district court reached the conclusion that the activities of these employees did not directly affect the safety of operation of motor vehicles transporting property in interstate commerce.[1] It follows from

[1] The district court found that on occasion the "breakout men" and the "wheelers" would assist the loader in placing in the truck a particularly heavy piece of freight which was too heavy for the "stacker" to handle alone. It is clear from the findings, however, that the "breakout men" and the

these findings that the court below properly held the exemption provided by Section 13 (b) (1) inapplicable to these employees. *United States* v. *American Trucking Ass'ns,* 310 U. S. 534; *Levinson* v. *Spector Motor Service,* 330 U. S. 649; *Pyramid Motor Freight Corp.* v. *Ispass,* 330 U. S. [illegible] Petitioner contends, however, that the decision below is erroneous because it is not the function of the courts, in deciding the applicability of Section 13 (b) (1), to determine whether the employees' duties affect safety of operation but merely to determine whether the employees are members of those classes of employees which the Interstate Commerce Commission has held affect safety of operation. Petitioner then argues that the "breakout men" and "wheelers" fall within the Commission's classification for "loaders", and that the "hostlers" fall within the classification for "drivers."

We submit that petitioner's contention as to the function of the courts in cases of this sort is

---

"wheelers" merely lent their physical support to the operation and that the responsibility for properly loading the truck was that of the "stacker" and "checker" alone (R. 301, 302). The district court also found that the "hostlers" sometimes couple tractors to loaded trailers prior to over-the-road trips (R. 305). However, petitioner does not claim this as a basis for invoking Section 13 (b) (1).

[2] The district court's decision applied the Administrator's interpretation which was rejected in the *Levinson* and *Ispass* cases, *supra.* The decision of the court of appeals, however, rendered after those decisions, affirmed on the basis of the *Ispass* case, *supra.*

without relevance here. An examination of the findings of the district court will disclose that the court applied the Commission's concept of activities which directly affect safety. *Ex Parte No. MC–2,* 28 M. C. C. 125. The contention that "hostlers" are drivers is based on the fact that, incidental to their duties of spotting trucks for loading and unloading, the "hostlers" drive the trailers and tractors from place to place entirely in and about petitioner's premises which includes driving a "negligible" amount of time "for a few feet" on two city streets[3] (R. 305). The Commission has specifically stated, however, that its jurisdiction relates to safety of operation of motor vehicles "on the highways of the country, and that alone" (*Ex Parte No. MC–2, supra, at* 129). Since private premises can by no stretch of the imagination be deemed public highways, and since the "negligible" amount of driving in the city streets was of such a "trivial, casual or occasional" character (*Pyramid Motor Freight Corp.* v. *Ispass, supra,* p. 708, the incidental driving involved here plainly does not render an employee a "driver" over whom the Commission has asserted jurisdiction. See also *United States* v. *American Trucking Ass'ns,* 310 U. S., at 548.

The "breakout men" and "wheelers" are claimed to be "loaders" because their duties re-

[3] Petitioner also contends that the "hostlers" also drive to an airport several miles from the warehouse. The findings of the district court, however, do not include this among the hostler's duties.

late generally to loading and unloading and the interchange of freight between trucks. It is urged that whether or not their particular activities in fact affect safety, the Commission has defined "loaders" to embrace them and that the Commission's definition determines the issue. Since the power of the Commission is limited to employees whose duties affect safety of operation, it would seem that this power cannot be enlarged by a definition which extends to employees whose activities do not affect safety. *United States* v. *American Trucking Ass'ns, supra; Levinson* v. *Spector Motor Service, supra; Pyramid Motor Freight Co.* v. *Ispass, supra.* In any event, "loaders" have not been defined to include persons engaged in the activities performed by the "breakout men" and "wheelers." The single sentence upon which petitioner relies to support a contrary conclusion (Pet. 4, 22, 29) appears to be quoted out of context. A reading of the entire report, we submit, makes clear (1) that the Commission has assumed jurisdiction only over employees whose activities directly affect safety, and (2) that only loading which relates to the proper disposition of the load on the motor vehicle is considered by the Commission to affect safety (*Ex Parte No. MC–2, supra,* at 133-134; see also *Levinson* case, *supra*). The "checkers" and "stackers" performed all the loading of this character and were held exempt. Moreover, this Court, in the *Ispass* case (330 U. S., at 708), held that the exemption applies

only to "that kind of 'loading' which is held by the Commission to affect safety of operation" and referred to activities of the character performed by the "breakout men" and "wheelers" here as activities which "will not come within the kind of 'loading' which is described by the Commission." Accordingly, petitioner's contention is contrary to the Commission's own view and the decision of this Court.

CONCLUSION

It is well settled that the Commission may regulate the hours and qualifications only of employees whose duties affect safety of operation of motor vehicles in interstate commerce. It is equally clear from the findings of the district court in this case that the activities of the "breakout men," "wheelers" and "hostlers" do not affect such safety. The decision of the court below is therefore patently correct and does not require review by this Court. The petition for a writ of certiorari should be denied.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

WILLIAM S. TYSON,
Solicitor,

MORTON LIFTIN,
Acting Assistant Solicitor,
United States Department of Labor.

SEPTEMBER 1947.

U. S. GOVERNMENT PRINTING OFFICE: 1947